United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1027

To be argued by ALAN J. SOBOL

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ANTHONY TAVOULARIS, VINCENT POERIO,
AND LOUIS DANIELS,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALAN J. SOBOL,
Attorney,
Department of Justice,
Washington, D. C. 20530.

I N D E X

CITATIONS

Cases: (Con't) Page

Cases: (Con't) Page

Cases: (Con't) Page

Statutes and Rules:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1027

UNITED STATES OF AMERICA,
Appellee

v.

ANTHONY TAVOULARIS, VINCENT POERIO,
AND LOUIS DANIELS,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE

ISSUES PRESENTED

1. Whether the evidence was sufficient to sustain the convictions.

2. Whether there were errors in the instructions to the jury.

3. Whether the trial court could properly refuse to allow government witness Di Rienzo to be impeached with a 1944

burglary conviction and whether two notes purportedly written by Di Rienzo should have been admitted into evidence.

4. Whether the trial court and the prosecutor properly questioned defense witness Melvin Berman.

5. Whether the prosecutor properly summarized the evidence in his closing argument.

6. Whether appellants Daniels and Tavoularis may challenge on appeal for the first time the authority of the Strike Force attorneys to present this case to the grand jury and whether an indictment is subject to dismissal when the indictment is signed by the United States Attorney and the evidence upon which it is based is presented to the grand jury by Department of Justice attorneys.

STATUTES INVOLVED

Title 18, United States Code, Section 2113, reads in pertinent part:

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or

money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever, receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York (Platt, J.), appellants were convicted of both conspiracy (count one) and the substantive offense (count two) of possessing United States Treasury bills in excess of $100 knowing them to have been stolen from a bank, in violation of 18 U.S.C. 2, 371 and 2113(c).[1/] Appellant Tavoularis was sentenced to concurrent terms of imprisonment for five years and fined $5,000 on each count. Appellant Daniels was sentenced to concurrent terms of imprisonment for three years. Appellant Poerio was sentenced to concurrent terms of imprisonment for five years, to run consecutively with a previously imposed sentence.

1/ A prior trial in December 1972 involving only Tavoularis resulted in a hung jury.

In October 1969, $13,194,000 worth of United States Treasury bills were discovered missing from the Morgan Guaranty Trust Company of New York (hereinafter referred to as Morgan) (Tr. 53-54, 59-60). These missing bills were part of an overall purchase of $37,000,000 worth of securities made by Morgan's government bond department which Morgan in turn had resold to three banks and which disappeared in processing before being deposited in the customer's accounts in Morgan's vaults (Tr. 41-43, 46, 52, 59-60, 65-66). On March 4, 1970, $2,600,000 of these bills (nine bills in amounts ranging from $50,000 to $1,000,000) were seized from the person of unindicted co-conspirator Stuart Norman at the time he, appellant Tavoularis and unindicted co-conspirator Joseph Di Rienzo were arrested (Tr. 127-128; Exhibits 4, 4A, 5, 5A, 5B, 6, 7, 7A, and 7B).

Primarily through the testimony of unindicted co-conspirators Di Rienzo and Norman,[2/] evidence was adduced that appellants, along with these two unindicted co-conspirators and unindicted co-conspirator Melvin Berman, formed a conspiracy through which the stolen Treasury bills were passed in the hope of an ultimate sale (Tr. 199-202, 204-208, 211-216, 218-223, 592-608, 618-619, 621-628, 653-656, 671-672).

2/ Norman pleaded guilty to a conspiracy count in an earlier indictment in connection with the case and had served two years' imprisonment before being paroled.

In the fall of 1969, appellant Daniels approached Norman and asked him if he knew where he (Norman) could get rid of any "stolen securities." At that time Norman told him "No" (Tr. 592-593, 618-619). However, sometime in late 1969, Berman mentioned to Norman that he was looking for something to make an "easy buck" with and asked Norman if he knew of anything around. Norman then mentioned the securities that Daniels had told him about and Berman indicated that he had a customer (Tr. 594, 626). As a result of that conversation, one day thereafter Norman and Berman went to Daniels' apartment. While Berman waited downstairs, Norman asked Daniels if the securities were still available. After Daniels made a phone call, he said that $3,000,000 in Treasury notes rather than securities were still available. When Norman gave this information to Berman, the latter asked for a sample (Tr. 594-596, 626-627).

Subsequently, Norman again went to Daniels' apartment, where he met appellant Vincent Poerio. After the former told Poerio that Berman was "the one that's getting rid of the note--the notes," Poerio went downstairs where Berman was waiting and told him only $2.7 million would be available at that time. The parties then made arrangements for Berman to view a sample note before the deal was concluded (Tr. 596-597).

In late February, appellant Poerio let Norman examine a sample $100,000 Treasury note. Norman then took the note over to Berman's house (Tr. 597-600, 621-626, 652, 671-672). Once there, Norman and Berman waited until appellant Tavoularis arrived, Berman's apparent customer. Norman and Berman had put the sample note on the dining room table, and when Tavoularis arrived, he and Berman went into the dining room while Norman remained in the living room. During this time, there were many phone calls back and forth between Berman's house and a bar where Poerio and Daniels were waiting. Thereafter, Tavoularis left Berman's house and sometime later Norman left as well, but without the sample note (Tr. 600-601, 653). The next morning Norman picked up the note and returned it personally to Daniels (Tr. 602, 672).

Around Friday, February 27, 1969, appellant Tavoularis asked Di Rienzo if he could "get rid of some treasury bills." Tavoularis said that three million dollars was involved, that he had been offered eight points, and that the two could split anything over that amount. Di Rienzo responded he knew a guy named Murray who he had done business with, who might be interested, and that he (Di Rienzo) would let Tavoularis know the next morning (Tr. 199-200, 202, 304-305).[3/]

3/ Di Rienzo testified that he did not in fact personally know any Murray, that he had only heard of him and that he never contacted him (Tr. 200).

The next morning, Di Rienzo told Tavoularis that his buyer was interested and would pay between 11 and 12 points, but that he wanted to see a sample bill (Tr. 201-202, 307-308). Tavoularis replied that if they "could pull this deal off he had access to 10,000,000 dollars more" (Tr. 203, 308). Thereupon, Tavoularis went to get the sample (Tr. 202, 308). That afternoon Tavoularis and Di Rienzo drove to a house in Howard Beach. While Di Rienzo waited in the car, Tavoularis went in the house and returned with the sample $100,000 Treasury bill. Tavoularis gave the bill to Di Rienzo, who then went home, showed the bill to his family and copied its serial number. Later that evening, he returned the bill to Tavoularis, telling him that his (Di Rienzo's) buyer would take the bills for 12% provided they got the bills to the buyer's house by 12:00 Tuesday (Tr. 204-208, 318-322, 350-352).

On Monday, March 2, 1970, Di Rienzo called the FBI and was referred to the Secret Service. They told Di Rienzo to keep his Tuesday meeting with Tavoularis (Tr. 208-211, 322-323).

On Tuesday morning, March 3, 1970, Di Rienzo met Tavoularis at a luncheonette. Tavoularis told Di Rienzo he did not have the bills yet but that Di Rienzo should wait there until he returned. Using the pretext that his buyer expected the bills before noon, Di Rienzo went outside to call him but instead called

the Secret Service to inform them of the circumstances. Di Rienzo returned to wait for Tavoularis. At 12:00, Tavoularis returned without the bills and told Di Rienzo that he would have them at about 2:00. Again using the pretext of notifying his buyer, Di Rienzo used the outside phone to inform the Secret Service of the status of the deal.[4/] At 2:00 Tavoularis returned to Frank's with an individual named Arnie and the three proceeded in Tavoularis' car to the house where they had obtained the sample bill. While Arnie and Tavoularis went in, Di Rienzo stayed outside--but observed the name "Berman" on either the door or mailbox. When the two came out, they told Di Rienzo they didn't have the bills. When Di Rienzo complained, Tavoularis told him he would definitely have the bills the next day (Wednesday) and instructed Di Rienzo to meet him that evening at a bar to work out the details (Tr. 211-215).

The same day Poerio gave Norman the entire package of notes in Daniels' presence. Norman then went to Berman's and together they counted $2,700,000 in notes.

That evening around 6:00 p.m. Norman went to meet Tavoularis at a bar. There Tavoularis introduced Norman to

---

4/ In between the 12:00 and 2:00 meetings, Di Rienzo met with the Secret Service. At that meeting, Di Rienzo was given a raincoat which he was to use as a signal when he saw the Treasury bills. Upon instructions, Di Rienzo had attempted to set up a meeting in Manhattan to transfer the bills but Tavoularis refused (Tr. 87-88, 212-213, 216-218, 399, 471, 472, 516-517).

unindicted co-conspirator Joseph Di Rienzo. Tavoularis explained to Norman that it was Di Rienzo who had the buyer (Tr. 218-219, 602-604, 653-654) and that they should go to the buyer's house. Di Rienzo, using the pretext that he'd have to check with his buyer first, went to the outside phone and called the Secret Service. When he received no answer, he called his wife. Upon returning to the bar, he told Tavoularis and Norman that his buyer was entertaining company and could not get away and in any event, he would not have the money until tomorrow morning and that they should bring the bills to his house before 12:00 noon. Tavoularis agreed and told Di Rienzo he would call him in the morning. 5/

The next morning, Wednesday, March 4, 1970, Tavoularis called Di Rienzo and told him that the bills would be at the luncheonette at 9:30. Di Rienzo then notified the Secret Service that morning.

Norman met Poerio and Daniels in a diner and the two again gave him the package of notes. From there Norman went to the luncheonette to again meet Tavoularis and Di Rienzo. He handed the package of bills to Di Rienzo, who examined the notes. After

---

5/ Di Rienzo testified on cross-examination that he did not tell the Secret Service about the meeting at Tom's Bar because the meeting's purpose was only to find out when he would receive the securities and not for him to see the rest of the securities. Both Norman's and Agent Jagen's testimony corroborated Di Rienzo's testimony (Tr. 398, 604, 82-83, 101).

examining the notes, Di Rienzo gave them back to Norman, who put them back inside his shirt. As the three left the luncheonette to meet Di Rienzo's buyer, they were arrested in front of Tavoularis' car after Di Rienzo gave a signal to the agents (Tr. 120, 216, 218-223, 357-358, 406-407, 478, 605-608, 628, 655-656).[6/]

In his defense, appellant Tavoularis called several witnesses. The gist of his defense was that he was present in the luncheonette on the day of the arrest in order to give a key to the bar next door to Norman so that the latter could get some equipment (Tr. 723-728, 808-811, 650-651, 659). Appellant Poerio merely introduced testimony from Melvin Berman that he had

---

6/ The bills were the Treasury bills missing from Morgan Guaranty (Tr. 74-75, 79-88, 102, 123). Appellant Daniels' latent fingerprints appeared on a Treasury bill recovered at the time of the arrest (Tr. 423, 427-428, 435; G. Ex. 6).

After the arrests in May, Tavoularis introduced Di Rienzo to a man identified only as Jimmy. The latter said: "A lot of people lost a lot of money and somebody ratted us out and it goes without saying when the rat gets on the stand we'll know who it is and we'll take care of him." In July 1970, as Di Rienzo was leaving his house, he found Tavoularis waiting for him across his street. Tavoularis took him to a luncheonette where he introduced him to appellant Poerio. Poerio told him, "We have a problem. There are a lot of people waiting to find out who the informer was and when he gets on the stand we're going to know who it is and we're going to take care of him." Lastly, one week later, Tavoularis stated to Di Rienzo, "Somebody ratted me out. I'm going to find out who it is and when I find out I'm going to bury him." (Tr. 223-224, 281-290, 498, 505, 522-523a, 537, 542-543).

never seen Poerio previously (Tr. 815-816). Appellant Daniels presented no witnesses.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTIONS.

As we have just detailed, the evidence showed that appellants Daniels and Poerio were engaged in efforts, in a "thieves" market, to sell with the aid of appellant Tavoularis $2,700,000 in Treasury bills that had been wrongfully taken from the Morgan Guaranty Bank. The bills involved included two $1,000,000 notes. Viewing this evidence in the light most favorable to the jury verdict, United States v. McCarthy, 473 F.2d 300, 302 (2nd Cir. 1972); and considering the evidence as to each appellant in its entirety, United States v. Wisniewski, 478 F.2d 274, 279 (2nd Cir. 1973); United States v. Bottone, 365 F.2d 389, 392 (2nd Cir. 1966), cert. den., 385 U.S. 974 (1966), the evidence was clearly sufficient for the jury to find that Tavoularis, Poerio and Daniels not only were active participants in a scheme to sell the Treasury bills, but contrary to their contention, that they did in fact have knowledge that the Treasury bills were stolen from a bank. Indeed, the jury could have properly inferred that the appellants

knew that the Treasury bills were stolen from a bank merely from their possession of these bills. See United States v. Fistel, 460 F.2d 157, 162-163 (2nd Cir. 1972); United States v. Izzi, 427 F.2d 293, 297 (2nd Cir. 1970), cert. den., 399 U.S. 928 (1970); Crone v. United States, 411 F.2d 251 (5th Cir. 1969), cert. den., 396 U.S. 896 (1969). Each appellant was, we submit, properly convicted of conspiracy and of possession of stolen Treasury bills.

Turning first to Daniels, the record flatly establishes his guilty knowledge. When he approached Norman initially about selling the Treasury bills, he admitted that they were stolen (Tr. 592-593, 618-619). Thus, the jury was not even called upon to draw any inferences regarding Daniels' state of mind concerning the bills' status. Moreover, his were the only identifiable fingerprints among the defendants (Di Rienzo's prints were identified also) to be found on the Treasury bills stolen from the Morgan Guaranty and recovered at the time of the arrest of Tavoularis, Di Rienzo and Norman (Tr. 42-49, 127-128, 423, 427-428, 455). Additionally, when Berman was inquiring whether or not the bills could be purchased, Daniels made a call and then reported that the bills were still "available" (Tr. 595). Also, the sample $100,000 Treasury note wrapped in newspaper which Poerio had given to Norman was returned personally to Daniels at his apartment (Tr. 602, 672).

When Poerio gave Norman the package of notes amounting to $2,700,000 on March 3, 1970, Daniels was present the entire time (Tr. 603). On the day of the arrest, March 4, 1970, Norman testified that both Daniels and Poerio gave him the $2,700,000 package (Tr. 605). In light of Daniels' incriminating admission and the other corroborating evidence, it is not surprising that the jury found he had the requisite guilty knowledge necessary for a conviction.

With regard to Poerio, the evidence was more than ample to support a finding of guilty knowledge. When Norman and Berman returned to Daniels' apartment to find out about a sample note, it was Poerio, not Daniels, who went downstairs and told Berman that only 2.7 million would be available at that time (Tr. 596-597). It was Poerio who gave Norman the $100,000 sample Treasury note wrapped in newspaper (Tr. 599). Further, it was Poerio again who gave Norman the entire package of 2.7 million of notes on March 3, 1970 (Tr. 603). When the deal was called off until the next day, Poerio was the one who made the phone call to find out whether the package would still be available the next day (Tr. 604) and both he and Daniels gave the complete package to Norman on the day of the arrest (Tr. 605). Lastly, Di Rienzo identified Poerio as the man Tavoularis introduced him to in July at the Rockaway

Luncheonette who said that "[w]hen [the informer] gets on the stand we're going to know who it is and we're going to take care of him" (Tr. 288). Thus, here again the evidence was sufficient for the jury to infer both from Poerio's statement and from his possession of the Treasury notes, as well as from any other corroborating evidence, that he had known the bills were stolen from a bank.

Finally, the evidence supporting the inference of guilty knowledge with respect to Tavoularis was ample. Tavoularis was the initiator when he approached Di Rienzo and asked if he could "get rid of some Treasury bills" and that any points they could get over eight, the two could split (Tr. 199-200, 202, 304-305). Moreover, Tavoularis told Di Rienzo that if they "could pull this deal off, he had access to 10,000,000 dollars more" (Tr. 203, 308). Tavoularis gave a sample $100,000 Treasury note to Di Rienzo, which Di Rienzo later returned (Tr. 204-208). When Di Rienzo went to Tom's Bar on the evening of March 3, 1970, to work out the details of the deal, Tavoularis introduced him to Norman, who had the bills and Tavoularis stated "let's go to your buyer's house." When Di Rienzo stalled the deal, it was Tavoularis who called him up and told him to be at Frank's the day of the arrest and again it was Tavoularis who said, "let's go" after they had all

rendezvoused (Tr. 218-223). Also, Tavoularis was arrested at the scene when the bills were recovered (Tr. 223). Furthermore, Tavoularis introduced Di Rienzo to Jimmy in the cafeteria of Aqueduct racetrack and was present when Jimmy stated, "A lot of people lost a lot of money and somebody ratted us out and it goes without saying when the rat gets on the stand we'll know who it is and we'll take care of him." Tavoularis was the one also who introduced Di Rienzo to Poerio and was present when Poerio made a similar incriminating statement, supra. Lastly, Tavoularis himself stated to Di Rienzo, "Somebody ratted me out. I'm going to find out who it is and when I find out I'm going to bury him" (Tr. 282-290). The jury could reasonably conclude that Tavoularis knew the bills he tried to sell were stolen from a bank.[7/]

II. THERE WERE NO ERRORS IN THE INSTRUCTIONS.

a. Appellants Tavoularis (Br. 30-50) and Daniels (Br. 25-27) claim that the court erred in giving the following

---

7/ Likewise, appellants' contention (Tavoularis Br. 33; Daniels Br. 22) that this circuit's ruling in United States v. Fistel, supra that "embezzlement" is within the purview of 18 U.S.C. 2113(b) and (c) should be overruled is without merit. In view of the continued vitality of United States v. Turley, 352 U.S. 407, 310-413 (1957) in which the Supreme Court held that the word "stolen" included embezzlement, we see no reason for this circuit to depart from its position in Fistel.

instruction concerning possession of the fruits of crime (Tr. 1065-1066; A. 154-155):[8/]

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances, or accounted for in some way consistent with innocence.

This instruction follows a principle of law set forth in haec verba in this Court's decision in United States v. Brawer, 482 F.2d 117, 125 (2nd Cir. 1973) and approved by the Supreme Court in Barnes v. United States, 412 U.S. 837 (1973). We submit, therefore, that the giving of this instruction was proper and that the various objections to this instruction should be rejected.

Tavoularis claims that he did not have the requisite possession to have this instruction apply to him. However, the evidence showed that he did have possession of a $100,000 note used as a sample and this possession alone properly makes the instruction applicable to him.

Tavoularis also argues that the four month interval of time between his possession and the disappearance of the notes makes his possession not recent. But this circuit has applied

---

8/ Appellant Tavoularis objected to this instruction at trial (Tr. 10841). Appellant Daniels, however, did not object to the instruction below.

the inference to gaps of four months and nine months between the theft and possession of stolen property in Boehm v. United States, 271 F.2d 454, 457 (2nd Cir. 1921); and six months in United States v. Izzi, supra, at 297. See also United States v. Martinez, 466 F.2d 679 (5th Cir. 1972), cert. den., 414 U.S. 1065, where recent possession of property eleven months after the theft thereof was sufficient for the purpose of drawing the inference of knowledge; Lee v. United States, 363 F.2d 469, 475 (8th Cir. 1966), cert. den., 385 U.S. 947 (1966), where five months was involved. In like vein, Daniels argues that the charge failed to direct the jury to determine whether the possession was sufficiently recent. However, if Daniels wanted the jury to be specifically charged on this issue, he should have submitted a request to the court.

Finally, it is contended that the instruction may not be "constitutionally or evidentially" applied in the circumstances of this case. In Barnes, supra, 412 U.S. at 843-847, the Supreme Court held that a jury would be justified in inferring from the unexplained possession of recently stolen mail that the defendant, who was charged with possession of checks stolen from the mails with knowlege they were stolen, possessed the mail with the knowlege that it was stolen. Here, the evidence showed that each

defendant was aware of the existence of approximately $3,000,000 of stolen notes. Especially, in light of this fact, the jury could properly infer that recent possession of these notes constitued guilty possession. See, in addition to Brawer, supra, United States v. Jacobs, 475 F.2d 270, 280 (2nd Cir. 1973), cert. den., 414 U.S. 821 (1973); United States v. Izzi, supra, at 297; United States v. DeSisto, 329 F.2d 929 (2nd Cir. 1964), cert. den., 377 U.S. 979 (1964).

b. Appellant Tavoularis (Tavoularis Br. 51-53) alleges that the trial court instructed the jury that "knowledge that the Treasury bills were stolen only had to be proved with regard to a single conspirator." However, nowhere in the charge to the jury can such an instruction be found. Rather, the court charged the jury that "one may become a member of a conspiracy without full knowledge of all the details of the conspiracy." And "[w]henever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then statements thereafter knowingly made and the acts knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts made may have occurred in the absence and without the

knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuancy of such conspiracy, and in furtherance of some object or purpose of the conspiracy" (Tr. 1057-1059). This instruction is a standard charge used in federal criminal cases and has been widely adopted. Lutwak v. United States, 344 U.S. 604, 617-618, 619 (1953); United States v. Jacobs, 431 F.2d 754, 761 (2nd Cir. 1970); United States v. Baker, 419 F.2d 83 (2nd Cir. 1969), cert. den., sub nom. United States v. DiNorscio, 397 U.S. 971 (1969); Rizzo v. United States, 418 F.2d 71 (7th Cir. 1969), cert. den., 397 U.S. 967 (1969). Moreover, counsel for Tavoularis failed to object to the conspiracy instruction on the grounds he now raises.

c. Appellant Tavoularis (Tavoularis Br. 53-54) also alleges that the trial court's "aiding and abetting" instruction is erroneous for the same reasons stated in regard to the conspiracy charge. Again, the record does not support appellant's contention. The court's charge on aiding and abetting (Tr. 1066-1067) has been widely approved. See, e.g., Sewell v. United States, 406 F.2d 1289 (8th Cir. 1969). Again, there was no objection to this portion of the charge.

III. THE TRIAL COURT DID NOT IMPROPERLY RESTRICT THE CROSS-EXAMINATION OF JOSEPH DI RIENZO.

It is well established that the trial court has broad discretion in controlling the scope of cross-examination. Alford v. United States, 282 U.S. 687 (1931); United States v. Evanchick, 413 F.2d 950, 953 (2nd Cir. 1969). Absent an abuse of this discretion, the rulings of the trial court must stand. United States v. Calabrese, 421 F.2d 108 (6th Cir. 1970), cert. den., 397 U.S. 1021 (1970). The record clearly reflects that the trial court did not improperly restrict the cross-examination of Di Rienzo, and indeed, provided great latitude to the defense in its cross-examination.

A. Di Rienzo's 1944 Conviction

Appellant Tavoularis raises as error the trial court's ruling that no convictions over ten years old would be admissible to impeach a witness's credibility (Tr. 130-142). Specifically, in issue is Di Rienzo's 1944 burglary conviction which the court would not allow to be used (Tr. 134).[9/] The gist of appellant's argument, relying on United States v. Palumbo, 401 F.2d 270 (2nd Cir. 1969), cert. den., 394 U.S. 947 (1969); and Luck v.

9/ While there is no question that before Di Rienzo testified, counsel for appellant Tavoularis requested a conference to address this issue, as well as others, and that a full discussion ensued, the record fails to reveal an objection to the court's decision to limit impeachment of a witness by excluding prior convictions over ten years old.

United States, 348 F.2d 763 (D.C. Cir. 1965), is that the rule that gives a court discretion to limit the use of prior convictions for impeachment purposes pertains only to defendants who testify and not to ordinary witnesses. Appellant's view is not well taken. The principal consideration in the exercise of a judge's discretion under this rule is whether the prejudicial effect of the conviction outweighs the probative relevance of the prior conviction on the issue of credibility. Luck v. United States, supra at 768-769. Thus, the ruling establishing discretion in the trial judge is applicable to all witnesses. Davis v. United States, 409 F.2d 453, 456 (D.C. Cir. 1969). That this is the case can readily be seen by examination of Rule 609(b) [10/] of the Federal Rules of Evidence (to become effective on July 1, 1975) and D.C. Code 14-305(b)(2)(b)(II) (Supp. IV, (1971)). Both these statutes make the exclusionary rule applicable to all witnesses. In the case at bar, the trial judge in responding to appellant's position repeatedly emphasized that regarding this issue, a defendant is

---

10/ See Rule 609(b), Federal Rules of Evidence, enacted on January 2, 1975, to become effective on July 1, 1975 (H.R. 5463, 93rd Cong., 2nd Sess.), wherein "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweights its prejudicial effect."

no different than any other witness, and that if a prior conviction is more than ten years old, it does not impeach a witness's credibility (Tr. 130-132).

In any event, Di Rienzo testified that he had been convicted in 1968 of petty larceny in connection with a loan application; that he pleaded guilty in 1972 to writing checks under false pretenses; that he pleaded guilty in 1973 to petty larceny in connection with backdating an insurance policy; that he did not file an income tax return in 1970; and that he lent money to co-workers at 20% interest a week (Tr. 293-296, 373-391, 515). In light of this, the admission of testimony concerning a 1944 burglary conviction would not have impeached Di Rienzo any more than he had already been impeached by the other convictions. We submit that the admission of the 1944 conviction would have been merely cumulative and it was well within the court's discretion to disallow cross-examination on this point for that reason alone.[11/] United States v. Miller, 478 F.2d 1315, 1318-1319

11/ In United States v. Owens, 263 F.2d 720 (2nd Cir. 1959) this Court held that the defendant in a criminal case is not entitled to conduct unlimited cross-examination of an adverse witness. The defense there sought to question the chief government witness on a recent burglary and the trial court precluded this inquiry. On appeal, this Court noted that the witness had already admitted to three convictions and the admission of this testimony would not further impeach the witness's credibility.

(2nd Cir. 1973), cert. den., 414 U.S. 851 (1973); United States v. Edelman, 414 F.2d 539, 540-541 (2nd Cir. 1969), cert. den., 396 U.S. 1053 (1969).

Davis v. Alaska, 415 U.S. 308 (1974) is not to the contrary. In Davis, the complaining witness was an adjudged juvenile delinquent and what was of concern to the court was his current probation status at the time of the events as to which he was to testify. The court held that a protective order barring questioning of his probation status because he was a juvenile must yield to the defendant's right of confrontation, the court emphasizing that the defendant was entitled to show that the witness was biased because of his current vulnerable status as a probationer and his concern that he himself might be a suspect in the very same burglary charged against the defendant. Indeed, here, unlike in Davis, appellant Tavoularis in fact cross-examined witness Di Rienzo as to his concern over what would happen to him if anyone reported him as a probation violator (Tr. 482).

B. Di Rienzo's Notes

Di Rienzo testified on direct examination that following his last meeting in July with Tavoularis outside the Rockaway Luncheonette, when Tavoularis told him that if he found out who the informer was he would "bury him" (Tr. 290), Tavoularis

subsequently called him on the phone, told him that he wanted to see him at the Rockaway Luncheonette, and concluded "No ifs, ands or buts, you'd better be there." Di Rienzo said "Okay" but never showed up. He further testified that from that point in time he did not have any further contact with Tavoularis (Tr. 291). He did state, however, that between the date of arrest, March 4, 1970, and that last telephone conversation with Tavoularis, he had lent $1,000 to Tavoularis at the racetrack and that Tavoularis had only paid him back $500. He further related that subsequent to the final phone conversation he had with Tavoularis, he found out Tavoularis wanted to get in touch with him. Di Rienzo sent him a note telling Tavoularis that the only way he, Tavoularis, could get in touch with him was to pay him the $525 12/ he owed Di Rienzo, and that Tavoularis should give the money to Di Rienzo's brother, which he did (Tr. 291-292). On cross-examination counsel for appellant Tavoularis produced this note that Di Rienzo had written to Tavoularis concerning the $525 and Tavoularis' desire to see him. After Di Rienzo admitted writing it, it was admitted into evidence (Tr. 341-343) (Defendant's Exhibit C). Counsel for appellant Tavoularis also produced two other notes, purported to

---

12/ The record is unclear whether it is $500 or $525 (Tr. 179, 291-292, 346).

have been written by Di Rienzo to Tavoularis (Defendant's Exhibits B and D).[13] With regard to Exhibit B, Di Rienzo stated that while the writing "Looks like my handwriting" he did not believe it was his writing. With regard to Exhibit D, he stated "It looks like mine but it is not"; that "It looks like a good copy but it is not my writing," and that "I definitely say it doesn't even look like my writing now that I looked at it good" (Tr. 339-340, 363-371, 468-470).

Tavoularis contends (Tavoularis Br. 60) that the trial judge excluded Exhibits B and D from evidence. An examination of the record, however, reveals that while these matters were discussed at length at side bar conferences, counsel for appellant never formally moved to admit these documents into evidence. Thus, the court never ruled formally on their admissibility (Tr. 143-194, 367-371).[14]

13/ In his brief, Tavoularis sets forth one of the notes, which in substance states that for $2,500 Di Rienzo would "bury himself" and not be available to testify at trial. He says that the other note was similar (Tavoularis Br. 15-16).

14/ See Coppedge v. United States, 311 F.2d 128, 133 (D.C. Cir. 1962), vacated and remanded on other grounds, 369 U.S. 438 (1962). There appellant's counsel and the trial court engaged in an extended conversation concerning the admissibility of a letter. There was no offer to introduce the letter into evidence. In these circumstances, the court of appeals held there was no error in the trial court's failure to receive the letter into evidence.

In any event, we submit, there are several grounds to exclude these notes even if they were offered into evidence (Exhibits B and D). Foremost, since Di Rienzo denied that he wrote the notes, it was incumbent upon Tavoularis to lay a proper foundation for their admissibility. It is clear that the party who seeks to introduce written evidence must in some way authenticate it and the sufficiency of that showing is a matter within the discretion of the trial judge. United States v. King, 472 F.2d 1, 7 (9th Cir. 1973), cert. den., sub nom. Butler v. United States, 414 U.S. 864 (1973); United States v. Covello, 410 F.2d 536, 543 (2nd Cir. 1968). See, United States v. Swan, 396 F.2d 883 (2nd Cir. 1968), cert. den., 393 U.S. 923 (1968); United States v. Ross, 321 F.2d 61, 70 (2nd Cir. 1963), cert. den., 375 U.S. 894 (1963). Here, there was an absolute failure to lay any foundation to support admissibility of notes B and D. The court asked counsel in a side bar conference if he was going to offer evidence of proof of authenticity and he answered, "I am not certain." After it was revealed that the government's report on the notes in issue was inconclusive as to authorship, the trial judge asked counsel how he was going to get the notes in evidence. Counsel was at first unresponsive, and then conceded that he did not himself have a report to support authorship, to which the judge

replied, "I did not think so, otherwise I think you would have had it up here" (Tr. 187-188). Counsel subsequently did not offer any handwriting experts. In view of this, any refusal by the trial judge to admit the notes into evidence would have been proper under its broad discretionary power with regard to admission of secondary evidence. United States v. Covello, supra; United States v. Ross, supra.[15/]

Defendant Tavoularis claims the purpose of submitting the two notes, Exhibits B and D, was to show bias, motive and revenge (Tavoularis Br. 60) and not recent fabrications. We submit, however, that introduction of the notes for this purpose would have been merely cumulative and would thus be well within the trial court's discretion as to its admissibility. See United States v. Miller, supra, at 1318-1319; United States v. Edelman, supra, at 540-541. The notes were cumulative because, as shown by Tavoularis (Tavoularis Br. 14-17) the content of the notes (B and D) was substantively identical in content to a conversation on the tapes, which were submitted into evidence.[16/] Therefore, assuming arguendo there was error, it was harmless.

15/ Compare Tavoularis' failure to authenticate the notes with his elaborate authentication of tape recordings of conversations allegedly between Tavoularis and Di Rienzo (Tr. 556-721).

16/ The tapes were admitted on the defense case, but only as prior inconsistent statements (Tr. 783). The tapes purportedly reflect [Footnote 16 continues on page 29.]

IV. THE TRIAL COURT AND THE PROSECUTOR PROPERLY QUESTIONED DEFENSE WITNESS BERMAN

Appellant Poerio called only one witness, unindicted co-conspirator Melvin Berman, who summarily stated that he had never seen Poerio before in his life (Tr. 815-816). He also stated he had never seen Daniels (Tr. 824-825) or Joseph Di Rienzo before (Tr. 824). He did state he knew Tavoularis and Norman (Tr. 824). Quite succinctly, Berman denied any and all connection with the Treasury bills, despite evidence to the contrary.

Prior to any questioning by counsel, the trial judge, wanting to find out the witness's background, inquired of his address, occupation and employment (Tr. 813-814). On cross-examination the prosecuting attorney asked Berman if he remembered being subpoenaed for the last trial, to which he responded affirmatively. When asked if he showed up, Berman explained he went to Brooklyn instead of Westbury. At this point, the trial judge interjected and asked him if he complied with the subpoena. What was brought out was that, despite the subpoena saying Westbury, Berman did not go there. Thereupon, the prosecutor questioned the witness about a letter he had received from the prosecutor and a

---

[Footnote 16 continued from p. 28.]

a phone conversation between Di Rienzo and Tavoularis wherein Di Rienzo said he knew Tavoularis was innocent and for $2,500 he would not testify against him. Di Rienzo denied ever having the conversation with Tavoularis (Tr. 337, 356-357).

subsequent phone conversation. The sum and substance of this cross-examination was that Berman had told the prosecutor he would come into his office for an appointment but he never showed up (Tr. 816-822).

A. The Prosecution's Cross-Examination of Witness Berman

It is axiomatic that the trial judge has broad discretion in determining and controlling the permissible scope and extent of cross-examination. United States v. Dickens, 417 F.2d 958 (8th Cir. 1969); United States v. Mahler, 363 F.2d 673 (2nd Cir. 1966); United States v. Bowe, 360 F.2d 1 (2nd Cir. 1966), cert. den., 385 U.S. 961 (1966). Furthermore, only where the defendant has been denied his right to be fairly tried will a reversal be warranted. United States v. Tomaiolo, 249 F.2d 683 (2nd Cir. 1957). Here, every substantive question objected to by counsel was answered in the affirmative by Berman. Not once was there a substantive disagreement between the two as to the facts. Berman acknowledged receiving a phone call from the prosecutor which was pursuant to an earlier letter regarding trial of the case (Tr. 818). He further acknowledged that he made an appointment, the only variance being that the prosecutor remembered it to be on a certain day and Berman some day in the near future (Tr. 821). In view of this

dialogue, we cannot find any unfairness or prejudice emanating to the degree that would require reversal. Both United States v. Puco, 436 F.2d 761, 762 (2nd Cir. 1971) and United States v. Block, 88 F.2d 618, 620 (2nd Cir. 1937), cert den., 301 U.S. 690 (1937), relied upon by appellants, are easily distinguishable. In both Puco and Block, through the use of detailed leading questions on cross-examination, the prosecutor was able to place before the jury pretrial incriminating statements of the witness which were not in evidence and which the witness's own testimony flatly contradicted. Such is not the case here.

B. The Trial Court's Questioning of Berman

That the trial judge in criminal cases must be more than a mere moderator or umpire is without question. He must take part where necessary to clarify testimony and assist the jury in the understanding and weighing of the evidence. United States v. Sclafani, 487 F.2d 245, 256 (2nd Cir. 1973), cert. den., 414 U.S. 1023 (1973); United States v. McCarthy, 473 F.2d 300, 308 (2nd Cir. 1972); United States v. DeSisto, 289 F.2d 833, 834 (2nd Cir. 1961). An evaluation of the record here clearly shows that the trial court did not exceed proper bounds either in tenor or extent. Rather, his questioning of Berman, as his questioning of DiRienzo and Norman, and other witnesses from time to time, was pertinent and generally related to valid inquiry. See United States v. DeLaughter, 453 F.2d 908 (5th Cir. 1972), cert. den., 406 U.S. 932 (1972);

United States v. Eustace, 423 F.2d 569, 572 (2nd Cir. 1970). With reference to what is raised as error, the court was clearly within its discretionary power to attempt to clarify whether or not Berman did obey the subpoena in the first trial and if not, why not. That Berman's answers were initially vague is without question. Here the court had a duty to clarify Berman's conduct for the jury. The brief questioning here by the trial court is in no way similar to the vigorous participation of the trial judge in United States v. Nazzaro, 472 F.2d 302 (2nd Cir. 1973). There this Court referred to the numerous acrimonious exchanges between the judge and defense counsel in the presence of the jury which led to the destruction of the impartial and judicious courtroom atmosphere. In short, an examination of the record here finds nothing to substantiate appellants' claims. See, United States v. Dilts, 501 F.2d 531, 534 (7th Cir. 1974); United States v. Larson, 507 F.2d 385 (9th Cir. 1974).

V. THE PROSECUTOR PROPERLY SUMMARIZED THE EVIDENCE IN HIS CLOSING ARGUMENT.

While it is well settled that the arguments of counsel must be confined to the issues of the case, the applicable law, pertinent evidence and such legitimate inferences as may properly be drawn therefrom, United States v. Lawson, 483 F.2d 535, 538 (8th Cir. 1974), cert. den., 414 U.S. 1133 (1974); Wakaksan v. United States, 367 F.2d 639, 646 (8th Cir. 1967), cert. den., 386 U.S. 994 (1967), both

defense attorneys and prosecuting attorneys are allowed reasonably wide latitude in their arguments. United States v. Garostiza, 468 F.2d 915, 916 (9th Cir. 1972); United States v. Jones, 433 F.2d 1107 (D.C. Cir. 1970). In relation to this, the assertions of error made by appellant Tavoularis with respect to the prosecutor's summation are without substance. The chief assignment of error is the claim that the prosecutor made statements as if they were in his personal knowledge. For example, Tavoularis argues that the prosecutor bolstered the credibility of the witness DiRienzo (Br. 76). However, an examination of the record reveals that this comment, taken in context, and not in isolation, shows that the prosecutor here did not say or insinuate that the statement challenged was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury. Therefore, under Lawn v. United States, 355 U.S. 339 (1958), n. 15 at 359, it was proper comment. See also, United States v. Torres, 503 F.2d 1120, 1127 (2nd Cir. 1974). Here, from the other portions listed by appellant (Br. 77, 80, 82) it is clear the prosecutor was essentially arguing his case regarding Tavoularis' feeling safe inside Frank's Luncheonette; drawing warrantable inferences regarding DiRienzo's purported buyer; and discussing the evidence regarding the notes and Tavoularis' refusal to go to Manhattan. For instance, it was proper for the prosecutor to comment on Berman's testimony for Berman

did in fact admit that he was subpoenaed, did not show up, was in contact with the prosecutor and did in fact move. Likewise, the prosecutor's comment concerning Tavoularis' motive as greed was supported by testimony related through Di Rienzo (i.e., ten million more if this deal goes through). Moreover, the prosecutor's remark about J. Edgar Hoover was clearly invited by counsel by the initial remark of Poerio's counsel concerning J. Edgar Hoover (Tr. 929). Cf. United States v. Battiato, 204 F.2d 717 (7th Cir. 1953).

Finally, the court told the jury that what the attorneys said was not evidence (Tr. 890-891, 1046, 1070-1072).

Viewing the summation in its entirety, there was nothing said which requires reversal. United States v. DeAlesandro, 361 F.2d 694, 697 (2nd Cir. 1966), cert. den., 385 U.S. 842 (1966); United States v. Briggs, 457 F.2d 908, 912 (2nd Cir. 1972), cert. den., 409 U.S. 986 (1972); United States v. Alberti, 470 F.2d 878, 882 (2nd Cir. 1972), cert. den., 411 U.S. 919 (1972).

VI. THE AUTHORITY OF DEPARTMENT OF JUSTICE ATTORNEYS TO PRESENT A CASE TO THE GRAND JURY MAY NOT BE CHALLENGED FOR THE FIRST TIME ON APPEAL. IN ANY EVENT, AN INDICTMENT SIGNED BY THE UNITED STATES ATTORNEY IS NOT SUBJECT TO DISMISSAL WHERE THE EVIDENCE UPON WHICH IT IS BASED IS PRESENTED TO THE GRAND JURY BY DEPARTMENT OF JUSTICE ATTORNEYS.

1. Although appellants did not object in the trial court to the presence before the grand jury of regular Department of

Justice, Criminal Division attorneys, appellants Tavoularis and Daniels now claim for the first time either that the indictment must be dismissed because these attorneys were not properly authorized to appear before the grand jury or that the case should be remanded to the district court to determine whether these attorneys were properly authorized to appear before the grand jury. We submit that this claim should have been raised prior to trial and may not be raised for the first time on appeal.

Rule 12(b)(2), F.R.Crim.P., provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." In Davis v. United States, 411 U.S. 233, 236-237 (1973), the Supreme Court held that this rule "applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court." It, therefore, concluded that a post-conviction claim of unconstitutional discrimination in the composition of the grand jury was waived.[17/] We submit that the

---

17/ In Davis, the court also said (411 U.S. at 241):

> If ... time limits are followed, inquiry into an alleged defect may be concluded and, if

defect here, the claim that government attorneys were not authorized to present the case before the grand jury, is also the type of claim that should have been presented prior to trial.

An examination of the Advisory Committee's Notes to Rule 12(b)(2) shows that the drafters meant to include the objection made here within this Rule. The Notes state in part:

> All such defenses and objections must be included in a single motion . . . Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury . . . presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings . . . [emphasis added.]

In light of this Rule, appellants' objection to the authority of the government attorneys has been waived. See also United States v. Crispino, 74 Cr. 923 (D.C., S.D.N.Y., 2/13/75), where the court stated, "A motion to dismiss an indictment based upon the presence of an unauthorized person before the grand jury must be made prior

---

[Footnote 17 continued from p. 35.]

> necessary cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout ... time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

to trial or it is waived." Cf. United States v. Sisca, 503 F.2d 1337, 1349 (2nd Cir. 1974); Sutherland v. International Ins. Co. of New York, 43 F.2d 969, 971 (2nd Cir. 1930).

Moreover, there is less reason here to give relief from the waiver provision of this rule than in Davis where the specific constitutional claim was discrimination against blacks in the composition of the grand jury. Here, the two defendants could have raised the issue below. They knew that Strike Force attorneys were involved in the prosecution of this case and they could have found out prior to trial whether these attorneys appeared before the grand jury. This is, of course, most apparent as to appellant Tavoularis since his prior trial, which resulted in a hung jury, was tried by Strike Force Attorney Fred Barlow. But even Daniels knew from arraignment that the case was being handled by the Strike Force. (See Tavoularis Br. 27; Daniels Br. 35). In these circumstances, appellants could have questioned the authority of these attorneys. Since they did not raise this issue below, appellants have waived the right to raise this issue and are thus now foreclosed from doing so.[18/]

18/ We have not combed the record to determine if appellants received grand jury minutes showing that Strike Force attorneys appeared before the grand jury.

2. Moreover, even if this issue had been raised below, we submit that an indictment signed by the United States Attorney is not subject to dismissal on the ground that unauthorized persons appeared before the grand jury where these persons are government attorneys. It is our position that any Department of Justice attorney may appear and conduct an inquiry before the grand jury and the scope of his authority before the grand jury may not nullify or circumscribe the action of the grand jury.

Such attorneys, after all, are "attorneys for the government" within the meaning of Rule 6(d) and 54(c) F.R.Crim.P., who are permitted to appear before the grand jury. As the court said in United States v. Kazonis, No. 74-238-5 (D. Mass.), in rejecting a claim such as was made here:

> The tradition of the common law thus accommodated the presence in the grand jury of any lawyer chosen by the individual prosecutor for the purpose of presenting the evidence, without regard to his particular commission or authority. The presence of the Special Attorney is clearly no violation of a fundamental rule but is in accord with an ancient tradition.

See also May v. United States, 236 Fed. 495, 500 (8th Cir. 1916).

Nor is there any valid reason why a defendant should have a right to nullify grand jury proceedings on the ground here urged. A defendant's right to a fair grand jury proceeding is in no

way prejudiced by the scope of authority of the particular attorney before the grand jury. But beyond this lack of prejudice, there is no more reason to dismiss an indictment on this ground than there would be to dismiss on the ground that there was inadequate or incompetent evidence before a grand jury. Such a challenge "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." Costello v. United States, 350 U.S. 359, 364 (1956). It would also circumscribe the powers of the grand jury to conduct an inquiry and return indictments despite the fact that the Supreme Court has ruled that such an inquiry may not "be limited narrowly by ... forecasts of the probable results of the investigation." United States v. Calandra, 414 U.S. 338, 343 (1974); Blair v. United States, 250 U.S. 273, 282 (1919). See also United States v. Kazonis, supra.

The claim here, moreover, simply falls into the category of a "housekeeping provision of the Department of Justice." If the letter of authority given to the particular government attorney should have been worded differently, this is a matter over which a defendant has no right to complain. See Sullivan v. United States, 348 U.S. 170, 173 (1954), where the Supreme Court, in discussing

an Executive Order which the United States Attorney had failed to comply with, stated:

> It was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction . . .
>
> . . . The evidence was presented by the District Attorney, who was a representative of the Department of Justice, notwithstanding that he failed to comply with the departmental directive. For this he is answerable to the Department, but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence.

Here, too, there may be no valid attack on the grand jury proceedings. 19/

19/ Finally, concededly our argument on the merits here has been made in summary fashion. We have not made it in more detail for two reasons. First, the issue was not raised below and the record is silent as to whether or not the Strike Force attorneys here had the same authorization letter as in United States v. Crispino, 74 Cr. 932 (S.D.N.Y.), decided February 13, 1974. We, therefore, believe that this Court need not reach the merits of this issue here. Second, a related issue has been submitted to this Court for decision on March 19, 1975 in In re Persico (No. 75-2030), and again will be submitted to this Court for decision on April 11, 1974. Our brief in Di Bella (No. 75-1121) sets forth in detail our reasons why we believe that Judge Werker's decision in United States v. Crispino, supra, is wrong. Copies of the Di Bella brief are being served on the attorneys for appellants.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of conviction should be affirmed.

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALAN J. SOBOL,
Attorney,
U.S. Department of Justice,
Washington, D. C. 20530.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief of Appellee have this day been mailed to counsel for Appellants at the following addresses:

Gustave H. Newman, Esquire
522 Fifth Avenue
New York, New York 10036

Sheila Ginsberg, Esquire
c/o William J. Gallagher, Esquire
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York 10007

James W. Dougherty, Esquire
United States Attorney's Office
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Martin Light, Esquire
66 Court Street
Brooklyn, New York 11201

DATED: April 9 1975

Alan J. Sobol

ALAN J. SOBOL, Attorney,
Criminal Division
U.S. Department of Justice
Washington, D. C. 20530
Tele. No. (202)-739-3670